Public Prosecutor v Soh Weng Thiam & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-09–456–09 OF 2018 AND W-09–457–09 OF 2018
YAACOB MD SAM, ZABARIAH YUSOF AND RAVINTHRAN PARAMAGURU JJCA
20 SEPTEMBER 2019

Customs and Excise — Duty — Import duty — Respondents bought imported luxury cars and registered them in their names in Langkawi — Respondents were granted exemption from paying import duty on the cars under Customs Duties (Exemption) Order 1988 — Condition attached to Exemption Order required cars not to be taken to mainland for more than 30 days per trip or more than 90 days in a year — Whether breach of that condition attracted penal consequences under s 138 of the Customs Act 1967 ('the CA') or merely civil liability to pay the unpaid duty under s 15(1) of the CA — Whether Customs authority had option of taking both criminal and civil action under the aforesaid provisions against defaulters

The respondents, who were the owners of eight imported Ferrari cars, had the cars registered in their names in Langkawi without payment of import duty under s 163E of the Customs Act 1967 ('the CA'). The vehicles were allowed to be taken to the mainland without payment of customs duty under the Customs Duties (Exemption) Order 1988 ('the Exemption Order') on condition the entry and presence of the vehicles on the mainland did not exceed 30 days per trip or 90 days in any one year. In the instant case, that condition was breached resulting in the respondents being charged in the magistrate's court under s 138 of the CA. Despite finding that the respondents had breached the Exemption Order, the magistrate acquitted and discharged all of them without calling for their defence. However, the vehicles were ordered to be forfeited. On the prosecution's appeal, the High Court affirmed the acquittal and discharge of the respondents and set aside the order of forfeiture. The instant appeal was against the High Court's decision. In acquitting and discharging the respondents, the magistrate held, inter alia, that the breach of the Exemption Order did not make the respondents criminally liable under s 138 of the CA but only caused the exemption to cease and the respondents to be liable to pay Customs the amount of duty payable on the cars. In affirming the magistrate's decision to acquit and discharge the respondents, the High Court held that s 138 was concerned with breaches of the CA itself and not to breaches of subsidiary legislation made thereunder including regulations or orders such as the Exemption Order. The High Court held that the prosecution of the respondents under s 138 of the CA was wrong; that, instead, a claim for unpaid

duty should have been made against the respondents under s 15(1) of the CA. A

Held, unanimously allowing the appeal, setting aside the acquittal and discharge of the respondents, ordering them to enter their defence to the charges and setting aside the High Court's order on the forfeiture of the cars: B

(1) Whilst the first part of s 138 of the CA referred to contraventions of the 'provisions of the Act', a holistic reading of the section would reveal that it was sufficiently wide to bring within its ambit any transgression of any 'condition' of any 'licence, permit' or 'exemption'. The use of the disjunctive conjunction 'or' in the latter limbs of s 138 widened the reach C of the provision to include a breach of a condition of any exemption that was granted under the CA. Hence, the breach of the condition in the Exemption Order would attract the penal consequence stipulated in s 138 (see paras 14–15).

(2) Although the High Court was correct in finding that s 15(1) of the CA D provided a civil liability for breach of a condition of the Exemption Order, it did not immunise the respondents from facing criminal liability under s 138 as the latter provision clearly brought contravention of any of the conditions of the Exemption Order within its ambit. The Customs E authority had the option of imposing both criminal and civil liabilities under the CA. The question of double jeopardy did not arise as imposition of civil liability under s 15(1) for the same offence was a separate matter from imposition of criminal liability under s 138. The former was a revenue-collection measure; the latter visited any infraction F of a condition of the Exemption Order with penal consequences (see paras 18–19).

(3) The prosecution had established a prima facie case against the respondents. Accordingly, their acquittal and discharge was set aside and G the respondents were required to enter their defence to the respective charges. That part of the High Court's decision setting aside the magistrate's order of forfeiture of the cars was also set aside for the issue of forfeiture to be addressed at the end of the trial (see paras 5 & 23–24).

[Bahasa Malaysia summary H

Responden, yang merupakan pemilik empat kereta Ferari yang diimport, telah mendaftarkan kereta tersebut di bawah namanya di Langkawi tanpa pembayaran duti import dibawah s 163E Akta Kastam 1967 ('AK'). Kenderaan tersebut dibenarkan untuk dibawa ke semenanjung tanpa pembayaran duti kastam dibawah Perintah Duti Kastam (Pengecualian) 1988 ('Perintah I Pengecualian') dengan syarat kemasukkan dan kehadiran kenderaan tersebut di semenanjung tidak melampaui 30 hari untuk setiap perjalanan dan 90 hari dalam satu tahun. Dalam kes ini, telah berlaku pelanggaran syarat tersebut yang menyebabkan responden telah dituduh di mahkamah majistret dibawah

s 138 AK. Walaupun wujud dapatan bahawa responden telah melanggar perintah pengecualian tersebut, majistret telah melepaskan dan membebaskan responden tanpa memanggilnya untuk membela diri. Namun, kenderaan tersebut telah diperintahkan untuk dilucuthakkan. Atas rayuan pendakwaan, Mahkamah Tinggi telah mengesahkan pelepasan dan pembebasan responden dan mengetepikan perintah rampasan. Rayuan ini adalah terhadap keputusan mahkamah tinggi. Mahkamah Tinggi memutuskan bahawa s 138 adalah berkaitan dengan pelanggaran AK tersebut dan bukannya pelanggaran undang-undang subsidiari yang dibuat dibawahnya termasuklah peraturan atau perintah seperti Perintah Pengecualian. Mahkamah Tinggi memutuskan bahawa pendakwaan responden dibawah s 138 AK adalah salah; dan sebaliknya satu tuntutan untuk duti yang tidak dibayar sepatutnya dibuat terhadap responden dibawah s 15(1) AK.

Diputuskan, dengan sebulat suara membenarkan rayuan, mengetepikan pelepasan dan pembebasan responden, memerintahkan mereka untuk membela diri terhadap pertuduhan dan mengetepikan perintah Mahkamah Tinggi untuk rampasan kereta tersebut:

(1) Walaupun bahagian pertama s 138 AK merujuk kepada pelanggaran peruntukan akta, satu pembacaan holistik seksyen tersebut akan menunjukan bahawa ianya adalah cukup luas untuk membawa dibawahnya apa-apa pelanggaran apa-apa syarat apa-apa lesen, permit atau pengecualian. Penggunaan kata penghubung agam disjunktif 'atau' dalam bahagian kemudian s 138 melebarkan capaian peruntukan untuk meliputi pelanggaran satu syarat untuk apa-apa pengecualian yang diberikan dibawah AK. Oleh itu, pelanggaran syarat dalam Perintah Pengecualian akan melibatkan kesan jenayah yang diperuntukan dibawah s 138 (lihat perenggan 14–15).

(2) Walaupun Mahkamah Tinggi membuat dapatan yang betul bahawa s 15(1) AK memperuntukkan liabiliti sivil untuk pelanggaran syarat perintah pengecualian, ianya tidak memberi imuniti responden daripada menghadapi liabiliti jenayah dibawah s 138 memandangkan peruntukan yang kemudian dengan jelas membawa pelanggaran apa-apa syarat daripada perintah pengecualian dibawahnya. Pihak berkuasa kastam mempunyai pilihan untuk mengenakan liabiliti sivil dan jenayah dibawah s 138. Persoalan pendakwaan dua kali tidak timbul memandangkan pengenaan liabiliti sivil untuk kesalahan yang sama adalah perkara yang berasingan daripada pengenaan liabiliti jenayah dibawah s 138. Yang terdahulu merupakan satu usaha mendapatkan hasil dan yang kemudian, menyebabkan apa-apa pelanggaran syarat perintah pengecualian dengan kesan jenayah (lihat perenggan 18–19).

(3) Pendakwaan telah membuktikan kes prima facie terhadap responden. Dan oleh itu, pelepasan dan pembebasan mereka telah diketepikan dan

responden telah diminta untuk membela diri atas pertuduhan. Bahagian keputusan Mahkamah Tinggi telah diketepikan dengan perintah majistret untuk rampasan kereta tersebut telah diketepikan atas isu pelucuthakkan yang perlu ditangani di akhir perbicaraan (lihat perenggan 5 & 23–24).]

Cases referred to

Lye Pong Fong v PP [1998] 6 MLJ 304, HC (refd)
Ng Poh Hwa v Ketua Pengarah Kastam & Ors [2018] 1 LNS 1288, HC (refd)
PP v Teh Cheng Poh [1978] 1 MLJ 68b (refd)

Legislation referred to

Customs Act 1967 ss 2(1), 14(1), 15, 15(1), 33, 127, 138
Customs Duties (Exemption) Order 1988 Item 21A
Federal Constitution art 7(2)

Appeal from: Criminal Trial Nos WA-41LB-25–10 of 2017 and WA-41H-58–10 of 2017 (High Court, Kuala Lumpur)

Zaki Asyraf bin Zubir (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
MM Athimulan (Ramli bin Mohd Salleh and Kamini Muniandy with him) (Athimulan & Co) for the respondent.

Ravinthran Paramaguru JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the public prosecutor against the decision of the High Court that affirmed the decision of the magistrates' court. The public prosecutor is also appealing against the decision of the High Court that allowed the cross-appeal of the eight respondents against the order of forfeiture made by the magistrates' court in respect of the luxury cars belonging to them. The eight respondents faced identical charges save for the particulars of the vehicles that they owned. All the charges were jointly tried in the magistrates' court.

BACKGROUND FACTS

[2] The background facts relevant to the instant appeal and the appeal before the learned High Court judge were largely undisputed. They are well laid out by the learned High Court judge in his judgment. We find it convenient to reproduce the following passages of the High Court judgment in which said facts are set out:

[3] The subject matters of this appeals are eight vehicles — all Ferraris (Spider, Scuderia, California and ltalia) which had been imported into Port Klang with approved import permits. These Ferraris were then registered in Langkawi in the name of the respondents without payment of import duty pursuant to s 163E of the Customs Act 1967.

[4] These duty free Langkawi-registered vehicles were allowed to be transported outside Langkawi into where and what is known as a Principal Customs Area (PCA) (which means the whole of Malaysia exclusive of Langkawi, Labuan and Tioman under s 163A) without payment of customs duty under Customs Duties (Exemption) Order 1988 ('the Exemption Order'). One of the conditions specified in the Exemption Order is that the entry and presence of such a vehicle in the PCA without payment of customs duty must not exceed 30 days per trip or 90 days in a year.

[5] The vehicles in this case were found to have been in the PCA for more than the stipulated period. This resulted in the respondents, as the owners of the vehicles being charged under s 138 of the Customs Act 1967. The respondents were acquitted and discharged by the magistrate without their defence being called. However, the vehicles were ordered to be forfeited.

[6] Hence the appeal and counter-appeal now before me.

[3] We would only add that the subject matter of the appeals, ie appeal by the public prosecutor and cross-appeal by the respondents were not the eight luxury vehicles alone. The subject matter includes the order of acquittal and discharge of all the respondents at the end of the case for the prosecution.

[4] The learned deputy public prosecutor submitted that the acquittal and discharge of the respondents by the learned magistrate without their defence being called cannot be sustained for the reason that on the undisputed facts, the prosecution had established a prima facie case. However, the learned magistrate's decision was affirmed by the High Court. The learned DPP also submitted that the reversal of the decision of the learned magistrate to forfeit the vehicles by the High Court cannot be sustained.

[5] We propose to address the question whether defence should have been called by the learned magistrate before addressing the issue of forfeiture of the vehicles. In the event the respondents are ordered to enter their defence, the issue of forfeiture of the vehicles should be addressed at the end of the trial.

FINDINGS OF THE MAGISTRATE

[6] As stated earlier, there was no dispute that the eight respondents were found to have allowed the vehicles that they owned to remain in the principal customs area ('PCA') for a period exceeding 30 days. At para 23 of the judgment, the learned magistrate made a finding that the vehicles were found near Hilton Hotel, Jalan Tun Razak, Kuala Lumpur which is outside of the

PCA. In the same paragraph, he also found that the vehicles had been brought in for a period of more than 30 days into the PCA.

[7] The charge against the respondent under s 138 was for breaching a condition of the Customs Duties (Exemption) Order 1988 ('the Exemption Order') which states that vehicles purchased under the said Order cannot be brought to the PCA for a period exceeding 30 days. Despite his finding that the vehicles in question were found outside the PCA for more than 30 days after being taken out of Langkawi, he acquitted and discharged all eight respondents without calling for their defence.

[8] The learned High Court judge summarised the principal findings of the learned magistrate for not calling the defence. As we find it to be an accurate summary, for sake of convenience, we reproduce the relevant passages below:

> [7] The learned magistrate principally held that as the Exemption Order was silent on the effects of breaches of or non-compliances with its conditions, such transgressions could not be the basis of preferring criminal charges premised on s 138 of the Customs Act 1967.
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> [8] Any such breach or non-compliance, according to the learned magistrate would only amount to a contractual matter between the respondents and the Customs authorities which the former had violated, entitling the latter to claim, including in the context of a civil claim, from the former the amount of duties payable on the cars. The learned magistrate has thus made a finding that failure to adhere to the requirement of the Exemption Order would cause the exemption to cease and the respondents be liable to pay the customs duties.
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> [9] The learned magistrate also made the finding that in the context of s 15, and given the failure to adhere to the relevant conditions of the Exemption Order, the cars in question would be considered as 'dutiable goods' and not 'uncustomed goods'.
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> [10] In addition, the learned magistrate ruled that s 119 on the reversal of the burden of proof must be positively invoked by the appellant before it could be applied by the court, and that on the issue of forfeiture of the said cars, the learned magistrate found the same to be warranted under s 127 of the Customs Act 1967.

DECISION OF THE HIGH COURT

[9] The learned High Court judge affirmed the decision of the magistrate to acquit and discharge the respondents without calling for their defence. His Lordship's decision turned on his interpretation of the offence creating provision in question, ie s 138 of the Customs Act 1967. He held that s 138 does not cover a breach of the conditions of the Exemption Order and that it is limited only to the breaches of the Act. His Lordship's reasoning on this point is stated in paras [28]–[30] which we reproduce below:

> [28] The learned magistrate held in para [38] of his grounds of judgment that s 138

A cannot be invoked because the Exemption Order itself is entirely silent whether non-adherence thereto is created as an offence. In my view this is not entirely accurate because it can also be an offence if any provision of the Customs Act 1967 makes a breach of or non-compliance with the exemption order as an offence. But there are no such provisions relevant to this case.

B [29] Instead, as stated earlier, the scope of s 138 of the Customs Act 1967 vis a vis the breaches contemplated in s 138 is limited only to the provisions of the Customs Act 1967, and does not include regulations or orders made pursuant to the Customs Act 1967.

C [30] Therefore I take the view that the charge against the eight respondents under s 138 in respect of a non-compliance with a condition of Custom Duties (Exemption) Order 1988 or the Exemption Order, which is a subsidiary legislation, cannot be sustained.

D **[10]** After ruling that s 138 does not criminalise breaches of subsidiary regulations or orders made under the Customs Act 1967, His Lordship further held that the prosecution could have availed s 15(1) of the same Act to penalise the respondents in this case. Section 15(1) allows the application of a civil penalty against those who contravene the conditions of the Exemption Order

E in question.

WHETHER S 138 CRIMINALISES BREACHES OF SUBSIDIARY LEGISLATIONS AND ORDERS?

F **[11]** Section 138 of the Customs Act 1967 under which the charges in question were preferred reads as follows:

> Every omission or neglect to comply with, and every act done or attempted to be done contrary to, the provisions of this Act, *or any breach of the conditions and restrictions subject to, or upon which, any licence or permit is issued or any exemption is granted under this Act*, shall be an offence against this Act and in respect of any such

G offence for which no penalty is expressly provided the offender shall be liable to a fine of not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both. (Emphasis added.)

H **[12]** There is no dispute that the vehicles in question were registered in Langkawi without payment of customs duty pursuant to the Exemption Order. The Exemption Order was made under s 14(1) of the Customs Act 1967 by the Minister. Item 21A of the Exemption Order 1988 imposes a condition that the said vehicles can only remain in the PCA for a period not exceeding 30 days per

I trip subject to a maximum period of 90 days in any one year. Given the evidence that was tendered in the magistrates' court, this condition was apparently breached by the respondents. Thus, the principal question that arises is, as correctly identified by the High Court, whether the contravention of this condition attracts the penal provision of s 138 of the Customs Act 1967.

[13] The first main reason of the learned High Court judge to hold that s 138 does not apply to breaches of subsidiary legislation is because the said provision 'mentions only breaches and non-compliances of the Customs Act 1967'. He said that it does not extend to 'conditions or exemptions granted under any subsidiary legislation made under the Customs Act 1967'. His Lordship also reasoned that if Parliament had intended to cover subsidiary legislation, it would have included the words 'or of any subsidiary legislation made thereunder'. The latter words appear in other provisions of the Act namely, ss 2(1), 33 and 127. This was also the position taken by counsel for respondents.

[14] With respect, we disagree with the learned High Court judge. Whilst it is true that, as the learned High Court judge noted, the first part of s 138 refers to contraventions of the 'provisions of the Act', in our view, a wholistic reading of the section would reveal that it is sufficiently wide to bring within its ambit any transgression of any 'condition' of any 'licence, permit' or 'exemption'. As shown by the italicised words of s 138 that we reproduced in para [11] above, the use of the disjunctive conjunction 'or' in the latter limbs of s 138 has widened the reach of the provision to include a breach of a condition of any exemption that is granted under the Act.

[15] For the above reason, we are of the view, that the breach of the condition in question, would necessarily attract the penal consequence stipulated in s 138.

[16] The second main ground of the learned High Court judge to hold that s 138 does not apply to the factual matrix of this case is this. His Lordship considered the import of s 15 of the Customs Act 1967. Section 15 allows the customs authority to re-impose duty on any goods that come within an exemption order if there was a breach of the specified conditions. The full provision reads as follows:

> Section 15 Re-imposition of duty
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> (1) If any goods, on which customs duty has not been paid by reason of an exemption granted under section 14, cease to comply with the conditions subject to which such exemption was granted or cease to be kept or used by the person or for the purposes qualifying them for such exemption, such goods shall, upon such cesser, become liable to the customs duty and the person to whom such exemption was granted and any person found in possession of such goods shall be jointly and severally liable to pay such customs duty.
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> (2) If any goods, which are liable to customs duty under subsection (1) and on which such duty has not been paid, are found in the possession or on the premises of any person other than the person authorized to possess them under the terms of such exemption, such goods shall, until the contrary is

A proved, be deemed to be uncustomed goods.

[17] The learned High Court judge held that the legal consequence for transgression of the Exemption Order is provided in s 15(1). He also noted that the Exemption Order does not create any offence. He further held that the factual matrix in this case would only entitle the customs authority to recover duties under s 15(1) and therefore the charge is unsustainable.

[18] With respect, we would disagree with this reasoning as well for the reason that the offence creating provision of s 138 clearly brings contravention of any of the conditions of the Exemption Order within its ambit. Therefore, although the learned High Court judge is correct in his finding that s 15(1) provides a civil liability for breach of the said condition in question, it does not immunise the respondents from facing criminal liability under s 138. The customs authority has the option of imposing both criminal and civil liabilities under the Customs Act 1967.

[19] We are also of the view that the question of double jeopardy does not arise as the imposition of civil liability under s 15(1) for the same offence is a separate matter from imposition of a criminal liability under s 138. The former is a revenue collection measure whereas the latter visits any infraction of a condition of the Exemption Order with penal consequence. For this reason, we also disagree that the Latin maxim *generalibus specialia derogant* applies. This issue was in fact addressed in the judicial review case of *Ng Poh Hwa v Ketua Pengarah Kastam & Ors* [2018] 1 LNS 1288 that learned DPP referred to us.

[20] In that case, the applicant was barred from leaving the country for non-payment of customs. duties. The liability to pay arose from breach of the same condition of the Exemption Order. One of the issues that arose was whether the doctrine of double jeopardy applied in the case as the applicant was ordered to pay custom duties under s 15(1) and was also issued with an offer to compound his offence by paying a fine of RM5,000.

[21] Azizah Hj Nawawi J (now JCA) answered the question in the negative. Her Ladyship cited art 7(2) of the Federal Constitution and the cases of *Public Prosecutor v Teh Cheng Poh* [1978] 1 MLJ 68b and *Lye Pong Fong v Public Prosecutor* [1998] 6 MLJ 304 and ruled that:

> ... the principle of double jeopardy only applies in criminal conviction, whereby a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence.

[22] In passing, she opined that the applicant had also committed an offence

under s 138 by reading the provision widely by giving emphasis to the same disjunctive limbs as we have done.

[23] For all the above reasons, we are of the view that the prosecution had established a prima facie case against all the respondents. We therefore allow the appeal by setting aside the order of acquittal and discharge granted by the learned magistrate and in its place substitute an order for all the respondents to enter their defence upon the said charges.

[24] In respect of the appeal of the prosecution against part of the High Court decision that set aside the order of forfeiture granted by the learned magistrate, in view of our decision to call for defence, we hereby set aside the said decision and order that it be decided at the end of the defence case.

Order accordingly.

Reported by Ashok Kumar